

No. 21165

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COM-
PANY, *Appellant,*

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, Re-
ceiver, etc., *et al., Appellees.*

VICTORIA SAVINGS AND LOAN ASSOCIATION,
Appellant,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, Re-
ceiver, etc., *et al., Appellees.*

SECURITY SAVINGS AND LOAN ASSOCIATION,
Appellant,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, Re-
ceiver, etc., *et al., Appellees.*

Opening Brief of Appellant Victoria
Savings and Loan Association.

FILED

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**Opening Brief of Appellant Victoria
Savings and Loan Association.**

Preliminary Statement.

This case involves the rights of depositors, including the holder of a cashier's check, to participate in the distribution of the assets of an insolvent national bank. It involves three basic questions: (1) whether an innocent depositor, including the person who obtained a cashier's check which was not cleared by the bank prior

to the time it was declared insolvent and taken over by a receiver, is entitled to a constructive trust on the assets of a bank where the deposit was fraudulently accepted by the bank and the cashier's check fraudulently issued by the bank, whose officers conceal from the depositor and the person obtaining the cashier's check the fact that the bank was then hopelessly insolvent, that its financial statements which it had issued were false, and that its officers were engaged in wrongful and illegal acts; (2) whether the Federal Deposit Insurance Corporation (hereinafter referred to as FDIC) as insurer of the deposits in said bank and the assignee by way of subrogation from said depositors of the insurance paid up to \$10,000 on deposits, should be subordinated in its claim as said assignee to the claim of the innocent depositors in the distribution of the bank's assets by virtue of certain wrongful acts of FDIC in connection with the operation of said bank and participating in keeping it open despite the knowledge that it was hopelessly insolvent; and (3) whether those depositors whose claims are based on certificates of deposit on which they were to receive illegal interest should be subordinated to innocent depositors in the distribution of the bank's assets.

Statement of Jurisdiction.

This action was initially brought by Appellant American Telephone and Telegraph Company (hereinafter referred to as Appellant AT&T) a depositor in the insolvent San Francisco National Bank (hereinafter referred to as SFNB), in the United States District Court for the Northern District of California against SFNB, FDIC (both as receiver of said bank and as insurer of the deposits in said bank) and numerous de-

positors including Appellant Victoria Savings and Loan Association (hereinafter referred to as Appellant Victoria) to prevent the bank's receiver, FDIC, from distributing the assets of the bank to those depositors whose wrongful acts contributed to the insolvency until innocent depositors, including Appellant AT&T, had been paid, and to impose a constructive trust on the assets of the bank in favor of said appellant [R. 1-12]. Appellant Victoria filed an answer in said action and a counterclaim against said Appellant AT&T and a cross-claim against all of the other co-defendants named by Appellant AT&T, excluding Appellant Victoria, seeking to impose a constructive trust on the assets of the bank in favor of Appellant Victoria, and, further, to prevent the bank's receiver, FDIC, from distributing assets of the bank to FDIC, as insurer and assignee of claims of depositors, or to depositors whose claims are based on certificates of deposit on which they received or were to receive illegal interest, until the innocent depositors, including holders of uncashed cashiers' checks, such as Appellant Victoria, have been paid [R. 15-34]. The District Court (Honorable William C. Mathes, Senior United States District Judge) on the Court's own initiative and without notice or hearing, dismissed the action, and all claims and counterclaims and cross-claims, for lack of jurisdiction over the subject matter as to all defendants and all counter-defendants and cross-defendants, other than defendant and cross-defendant FDIC, and, in exercise of its discretion, dismissed the defendant FDIC as receiver and as insurer of the depositors insofar as declaratory relief was sought, which dismissal specifically stated it did not operate as an adjudica-

tion upon the merits [R. 20-24]; denied the motions of Appellant AT&T and Appellant Victoria to vacate said order [R. 157-158]; and then granted the motion of FDIC to dismiss the entire action on the ground that it did not state a claim upon which relief could be granted, with leave to Appellant AT&T and Appellant Victoria to present their claims by seeking intervention, pursuant to Federal Rule of Civil Procedure 24, in Civil Action No. 43512, (N. D. of California) in the matter of the liquidation of the San Francisco National Bank.

The District Court had jurisdiction over the action, including the counterclaim and cross-claims of Appellant Victoria, under Section 1819 of Title 12 of the United States Code as to defendant and cross-defendant FDIC, which specifically provides:

“All suits of a civil nature at common law or in equity to which the (Federal Deposit Insurance) Corporation shall be a party shall be deemed to arise under the laws of the United States.”

It also had jurisdiction over the other defendants and cross-defendants pursuant to Section 1331 of Title 28 of the United States Code because “the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the . . . laws . . . of the United States” and, further, said defendants and cross-defendants are interested in the subject matter and are proper parties thereto and, therefore, should be made parties to this action.

This Court has jurisdiction to hear this appeal pursuant to Section 1291 of Title 28 of the United States Code.

The Facts.

The facts set forth in the complaint of Appellant AT&T and cross-claims and counterclaim of Appellant Victoria must be accepted as true.

Atlantic and Gulf Stevedores, Inc. v. Donovan
(5 Cir. 1960), 274 F. 2d 794;

Williford v. People of California (9 Cir. 1965),
352 F. 2d 474, 475.

On January 16, 1965, SFNB held \$500,000 of funds belonging to Appellant Victoria and, in addition, owed Victoria \$10,000. For said funds on said date it issued its cashier's check to Victoria in the amount of \$360,000 on which the FDIC has since paid \$10,000 to Victoria, being the amount of the insurance coverage on said deposit; and also, on said date, said bank issued its certificate of deposit in the amount of \$150,000 to Appellant Victoria, for which Victoria was to receive only the legal rate of interest [R. 23]. Said cashier's check and said certificate of deposit were forwarded by said SFNB to Appellant Victoria by cover letter dated January 19, 1965, and received by Appellant Victoria in Riverside, California, on January 20, 1965 [R. 23]. Two days later, on January 22, 1965, the bank was declared by the Controller of Currency to be insolvent and the FDIC was appointed receiver [R. 23-24, 79, 433-434].

Some holders of certificates of deposit in SNFB at the time it was declared insolvent, and who are named defendants in this action, received directly or indirectly from SFNB, in addition to interest at the legal rate, compensation in the form of bounties for their deposits [R. 23, 433].

On January 14, 1965, Appellant Victoria requested SNFB to issue to it a cashier's check for \$360,000, and a certificate of deposit for \$150,000, for the five \$100,000 certificates of deposit issued by said SFNB which were held by Appellant Victoria and were due on January 16, 1965, plus \$10,000 accrued interest thereon [R. 24]. On January 14, 1965, on January 16, 1965, the date that said SFNB dated the cashier's check in the amount of \$360,000 in favor of Appellant Victoria, and also the certificate of deposit in the amount of \$150,000, and on January 19, 1965, the date that said bank forwarded said certificate of deposit and cashier's check to Appellant Victoria said SFNB was insolvent, which fact was unknown to Appellant Victoria but was known to SFNB and its officers, as well as to the Controller of the Currency of the United States and to the defendant and cross-defendant FDIC; and, in addition, on each of said dates said SFNB and defendant and cross-defendant FDIC concealed from Appellant Victoria not only the true financial condition of said bank, but also that the bank officers had been engaged in activities impairing its financial stability and violating federal laws and regulations [R. 24 and 30-33].

Appellant Victoria rescinded its certificate of deposit dated January 16, 1965, and its cashier's check dated the same date, and demanded the return of the \$510,000 represented by said certificate and said cashier's check [R. 25]. Except to the extent that the FDIC paid Appellant Victoria \$10,000 insurance proceeds for that portion of its cashier's check protected by federal insurance. FDIC has refused to return said sum of \$510,000 belonging to Appellant Victoria, or any part thereof

[R. 25]. Appellant Victoria filed a claim with FDIC as receiver for priority and preference in connection with the liquidation, for the sum of \$500,000, plus interest in the amount of \$110.99, which claim has been denied by said receiver [R. 25-26 and R. 436]. FDIC takes the position that Appellant Victoria is only entitled to share in the assets of the estate of SFNB on the same basis as all general creditors, including FDIC as insurer and assignee from certain creditors, and including depositors whose claims are based on certificates of deposit on which they received the illegal bounties from said bank [R. 436.]

Appellant Victoria's cross-claims and counterclaim filed in this action are substantially the same as the complaint filed by Appellant AT&T, excepting for certain factual differences with regard to times of deposits and the holding of a cashier's check, and excepting for Appellant Victoria's sixth count directed against the FDIC, as insurer and as receiver, to subordinate the claim of FDIC as insurer and assignee of insurance claims paid to depositors to the claim of Appellant Victoria by reason of certain illegal and improper acts of the FDIC as insurer [R. 29-33].

By the order dated April 13, 1966 and entered on April 18, 1966, Judge Mathes, to whom this case had been assigned along with many of the other cases arising out of the failure of the SFNB, issued an order [R. 90-94] on his motion and without notice or hearing [R. 93] dismissing the action as to all defendants and cross-defendants other than FDIC [R. 63-64]. This dismissal was on the ground of lack of jurisdiction over the subject matter as to all defendants and all counter-defendants and cross-defendants other than defendant

and cross-defendant FDIC, and as to said defendant was dismissed under the court's discretion insofar as declaratory relief is sought. This dismissal specifically did not operate as an adjudication upon the merits [R. 94]. Appellant AT&T and Appellant Victoria moved to vacate this order [R. 95-110 and 112-120]. Judge Mathes, again without a hearing, denied these motions, but stated that the order was entered without prejudice to the right of the dismissed defendants and cross-defendants, if so advised, to seek intervention, pursuant to Federal Rule of Civil Procedure 24, in Civil Action 43512, *In the Matter of the Liquidation of the San Francisco National Bank* now pending in the same court [R. 157-158], which order was dated May 25, 1966. On the same date Judge Mathes granted, also without hearing, the motion of defendant and cross-defendant FDIC to dismiss the remaining parts of the action, including the remaining parts of the cross-claims of Appellant Victoria [R. 155-156]. Said order also provided that the dismissal was granted with leave to the plaintiff and cross-claimants to present their claims by seeking intervention pursuant to Federal Rules of Civil Procedure 24 in Civil Action 43512, *In the Matter of the Liquidation of the San Francisco National Bank* then pending in the same court.

Appellant Victoria filed timely notice of appeal to the orders of Judge Mathes as follows: (1) Order dated and entered on May 25, 1966, dismissing the action, including the cross-claims and counterclaims of Appellant Victoria, (2) Order entered on April 18, 1966, dismissing action as to certain defendants and as to certain claims, and (3) Order dated May 25, 1966 denying motion of plaintiff and cross-claimant Victoria to vacate said order of April 18, 1966.

In accord with Judge Mathes' suggestion, Appellant Victoria and Appellant AT&T also filed petitions to intervene in the proceedings mentioned in the court's two orders, to wit, *In the Matter of the Liquidation of the San Francisco National Bank*, U.S.D.C. 43512 (hereinafter sometimes referred to as "the liquidation proceedings"). Judge Wollenberg denied these petitions by order dated July 7, 1966, and filed July 8, 1966, and Appellants Victoria and AT&T have filed timely notices of appeal to this Court from that order. Thus, Appellants AT&T and Victoria are placed in the intolerable position of having one judge of the District Court state that their claims concerning the liquidation of this national bank cannot be brought in Federal Court in a plenary proceeding such as they have done in the case on appeal herein, but should be brought in the liquidation proceedings brought by the receiver and pending in said Court, and another judge of the same court who was handling the liquidation proceedings stating that their claims cannot be brought in the liquidation proceedings, and thus inferring that they should have been brought in an independent action such as these appellants have brought in this action which is on appeal herein.

Specification of Errors.

Appellant Victoria hereby sets forth the specification of errors which it relies upon in this Appeal.

1. The District Court erred in dismissing the action, including the cross-claims and counterclaims of Appellant Victoria, and in denying the motion of said appellant to vacate said order, since Appellant Victoria was entitled to have determined therein its claim

to priority in the liquidation on the basis of a constructive trust since the insolvent bank received appellant's funds at a time when it was insolvent to the knowledge of its officers.

2. The District Court was in error in dismissing this action and the cross-claims of Appellant Victoria as to defendant FDIC on the ground that Appellant Victoria was entitled to have determined therein its claim to have the claims of defendant FDIC as insurer, subordinated to the claim of Appellant Victoria, due to improper and illegal acts of said defendant FDIC.

3. The District Court was in error in dismissing this action and the cross-claims of Appellant Victoria as to defendant FDIC as receiver, on the ground that Appellant Victoria was entitled to have the court approve its claim to priority in the liquidation of the national bank and a determination that said receiver held assets belonging to appellant and to turn said assets over to said appellant since said assets were obtained from Appellant only six days before the bank was declared insolvent and at a time that the bank was insolvent and known to be insolvent by its officers.

4. The District Court was in error in dismissing this action and the cross-claims of Appellant Victoria as to all defendants other than defendant FDIC since Appellant Victoria is entitled to have the claims of said defendants, which were based on certificates of deposit for which they received or were to receive illegal interest, subordinated to the claim of Appellant Victoria, and they are proper parties to the determination of said issue and further that they are proper parties to the determination of the first three errors specified herein.

Summary of Argument.

Appellant Victoria is entitled to a constructive trust upon the assets of SFNB in the amount of \$500,000, which represents the cashier's check which was issued by said bank but was not cleared prior to the time the bank was declared insolvent by the Controller of the Currency, and the certificate of deposit issued by said bank, because at the time said bank issued its certificate of deposit and cashier's check in favor of Appellant Victoria, for funds of Appellant Victoria which it held, said bank was insolvent and fraudulently concealed its true financial condition from Appellant Victoria, and, further, fraudulently concealed certain illegal acts of said bank and its officers. The imposition of a constructive trust does not violate the requirement that assets of an insolvent national bank must be distributed pro rata. Appellant Victoria's funds augmented the assets of the bank and are traceable to those assets in the hands of the receiver.

As an alternative to such a constructive trust Appellant Victoria claims that it and other innocent depositors are entitled to a preference in the liquidation of the bank's assets over the claim of FDIC as insurer and assignee of depositors, and over certain depositors by reason of certain illegal and improper acts of said FDIC as insurer and by certain depositors. The FDIC and these depositors are proper parties to the determination of this issue since their interests are virtually affected thereby and by reason thereof they should be parties to this action.

ARGUMENT.

Excepting for minor factual differences, the complaint of AT&T and the cross-claim of Appellant Victoria are identical, except that Appellant Victoria has added a sixth count against defendant and cross-defendant FDIC seeking to have its claim in the liquidation as insurer and assignee of the claims of depositors on which it has paid the insurance coverage subordinated to the claim of Appellant Victoria on the ground that the FDIC as insurer participated in keeping SFNB open and in the renewal of certificates of deposit and issuance of the cashier's check, and in obtaining funds from the public, including Appellant Victoria, after the time in which it knew, or had reason to know, that the bank was hopelessly insolvent and, that the bank officials were engaged in certain illegal acts [R. 29-34]. A similar cause of action against the FDIC on the same theory was brought by the cross-claimants in the case of *FDIC v. AMR. Inc.*, United States District Court for the Northern District of California Case No. 43272, and was dismissed by order of Judge Mathes and said dismissal is presently on appeal to this court, Case No. 21237A.

I.

The Counterclaim and Cross-Claims of Appellant Victoria State Facts Which Entitle Said Appellant to a Constructive Trust on the Assets of the Bank Held by the Receiver and, Therefore, Entitle It to Priority in Payments to Be Made on Liquidation.

A. The SFNB's Fraudulent Acceptance of Appellant's Fund Is Ground for Imposing a Constructive Trust.

The general rule now is, and has been for many years in federal as well as in state courts throughout the

United States that the acceptance of deposits by a bank at a time in which it is hopelessly insolvent to the knowledge of its officers and unbeknown to the depositor constitutes fraud on the depositor and entitles the depositor to rescind and recover back the money or give him a preferential claim or create a trust *ex maleficio*, thus entitling him to priority in the liquidation.

Annotations 20 A.L.R. 1206-14 and 81 A.L.R. 1078;

St. Louis & S.F.R. Co. v. Johnston (1890), 133 U.S. 566, 576-578; 33 L. Ed. 683, 10 Sup. Ct. Rep. 390;

Wasson v. Hawkins (1894), 59 Fed. 233;

Carnegie-Illinois Steel Corporation v. Berger (3 Cir. 1939), 105 F. 2d 485, 487.

Appellant Victoria in its counterclaim and cross-claims alleges facts sufficient to impose the doctrine of constructive trust and to entitle it to priority in the liquidation over the claims of other creditors, including priority over FDIC in its corporate capacity.

Said appellant alleges [R. 23-24] that for the five \$100,000 certificates of deposit issued by said SFNB for funds deposited by said appellant therein and which were due on January 16, 1965 plus \$10,000 accrued interest thereon it on January 14, 1965 in writing sent said certificates properly endorsed to said bank and requested it to send its check for the sum of \$360,000 and to issue a new certificate of deposit, for the sum of \$150,000; that said bank did not honor the request of said appellant until January 19, 1965 when it sent to said appellant cashier's check of said bank dated January 16, 1965, in the amount of \$360,000 and its cer-

tificate of deposit dated the same date in the amount of \$150,000 which were received by said appellant on January 20, 1965; that two days after the receipt of said certificate of deposit and said cashier's check and at a time before the cashier's check had cleared said SFNB, the Controller of Currency on January 22, 1965, declared the bank insolvent and appointed defendant FDIC as receiver; that on January 14, (the date of the request for its funds), on January 16 (the date of the issuance of the cashier's check and certificate of deposit), and January 19, 1965 (the date of the mailing of said cashier's check and certificate of deposit to Victoria) said bank was insolvent, which fact was unknown to appellant Victoria but was known to said bank's officers and to the Controller of Currency of the United States and to the defendant FDIC and further that it was known to them that said bank officers had been engaging in activities impairing its financial stability and violating federal laws and regulations [R. 23-24].

A cashier's check issued by a bank for funds received by the bank is until it is cleared by said bank deemed a deposit in said bank and was so treated in this case by defendant FDIC as insurer in paying the \$10,000 insurance coverage on the \$360,000 claim of appellant Victoria arising out of said cashier's check.

The counterclaim and cross-claims of appellant Victoria further allege that it rescinded the January 16, 1965, certificate of deposit and cashier's check and de-

manded that the receiver return the \$500,000 represented thereby; that the receiver has refused to do so; that said appellant filed with defendant FDIC as receiver its proof of claim—priority and that the receiver has denied the same [R. 25-26]. It further alleges that said bank on January 16, 1965, by soliciting and accepting appellant Victoria's agreement to accept a certificate of deposit in the sum of \$150,000 and a cashier's check in the sum of \$360,000 under the circumstances that the bank at that time was then insolvent and said fact was known to its officers and not known to said appellant, perpetrated a fraud upon said appellant resulting therefore in a constructive trust in favor of appellant Victoria on the \$500,000 of funds of said appellant held by said bank [R. 26-27].

Also a constructive trust may be imposed entitling a depositor in a bank to priority in the liquidation of an insolvent bank when the funds are received or held by the bank under circumstances which render it wrong or contrary to law and good conscience for the bank to accept or retain the deposit (*Tucker v. Newcomb* (4 Cir. 1933), 67 F. 2d 177, 179). It is submitted that the acts of other creditors who obtained illegal bounties for their deposits on which they have filed claims and the wrongful acts of the officials of the regulatory authorities including FDIC as set forth in the Sixth Cause of Action of appellant Victoria's cross-complaint are such that a constructive trust exists in favor of Victoria on the funds contained in said bank for the

amount of its claim, to wit, \$500,000 over and prior to the claims of the other creditors including the FDIC.

Section 194 Title 12 of the United States Code provides for ratable distribution of the assets of an insolvent national bank. This section does not prevent the imposition of a constructive trust on certain assets of the bank since by the imposition of said trust there is a determination made that those assets rightfully do not belong to the bank. *Scott v. Armstrong* (1892), 146 U.S. 499, 510.

In an equitable receivership proceeding as well as in a statutory receivership proceeding such as is involved in this matter, the normal and usual equitable principles in determining priority claims in the liquidation of a bank must be followed. An examination of the annotations under Section 194, Title 12 United States Code Annotated shows that the doctrine of constructive trust and other related equitable doctrines permitting certain creditors to have priority in the liquidation of an insolvent national bank are applicable and are determined by the Federal Court. Subdivisions 61-120 of said annotated code set forth numerous cases considering the matter of priority claims, including a special section on the constructive trust doctrine when the bank was insolvent at the time the deposit was made.

The Supreme Court has recognized that in the distribution of assets of an insolvent national bank equitable principles govern, and that priorities may be granted where the facts justify the same irrespective of the ratable distribution provisions in the statute.

Scott v. Armstrong (1892), 146 U.S. 499;

American Surety Co. v. Bethlehem National Bank (1941), 314 U.S. 314.

B. The Renewal of Appellant Victoria's Certificate of Deposit in the Amount of \$150,000 and Issuance to It of a Cashier's Check in the Amount of \$360,000 on January 16, 1965 Augmented the Assets of the Bank for the Purposes of a Constructive Trust.

When SFNB on January 16, 1965 renewed \$150,000 of the certificates of deposit which appellant Victoria had on deposit with said bank and which became due on said date and issued to it a cashier's check in the sum of \$360,000 on the same date for the balance, it obtained funds of Victoria to use which it otherwise would not have been entitled and therefore the requirement of augmentation of the assets of the bank in order to impose a constructive trust have been met. *Federal Reserve Bank v. Idaho Grimm Alfalfa Seed G. Ass'n.* (9 Cir. 1925), 8 F. 2d 922, 928.

The Courts are more inclined to find an augmentation in cases of constructive trusts or trusts *ex maleficio* such as principal case. *Jennings v. U.S.F. & G. Co.* (1935), 294 U.S. 222-223.

C. Appellant Victoria's Deposit Is Traceable to Assets of the Bank Remaining After Insolvency.

The funds represented by the January 16, 1965, deposits in said bank, as evidenced by the cashier's check of said date and the certificate of deposit of said date may be clearly traced into funds acquired by the receiver six days later on January 22, 1965. When a fraud is committed by the bank when it received the assets of appellant Victoria on January 16, 1965, it had no right to commingle said assets with its other funds and a constructive trust is imposed on said assets and same are deemed to be maintained intact as the property of Appellant Victoria.

National Bank v. Insurance Co. (1881), 104 U.S. 54, 69-70.

II.

The Claims of Appellant Victoria Present Federal Questions of Which the Federal Court Has Jurisdiction as to All Defendants.

On January 22, 1965, the SFNB was declared insolvent by the Controller of Currency of the United States and the FDIC was appointed receiver, both of which acts were done under federal law, this being a national bank. Section 191 of Title 12 of United States Code. It is the receiver's duty to liquidate said bank by collecting all of its assets and distributing the same to those entitled thereto. It has under federal law required all claimants of said bank to submit the claims to it. 12 U.S.C. 193. Said receiver must determine what assets properly belong to the bank and what assets belong to someone else. In so doing it is acting in its capacity as a receiver under the laws of the United States. If at the time of the insolvency due to the fault of the bank, assets are held of a person upon whom a fraud has been committed such as Appellant Victoria claims, then those assets do not belong to the bank, but belong to Appellant Victoria. The very imposition of the constructive trust doctrine as previously discussed herein involves a determination whether or not certain assets belong to the bank or belong by virtue of said doctrine to Appellant Victoria. *Scott v. Armstrong* (1892), 146 U.S. 499, 510. This claim for a constructive trust was presented by Appellant Victoria in writing in its claim duly filed with defendant and cross-defendant FDIC as receiver [R. 25-26]. The receiver has denied this claim and, therefore, Appellant Victoria, in order to establish the validity of its claim for priority, must bring an action

against the receiver who is the receiver appointed by and acting under Federal Laws, 12 U.S.C. 191.

In addition Appellant Victoria claims that it is entitled to priority over the claim of the defendant and cross-defendant FDIC as insurer and as assignee of the claims of depositors on which it has paid the insurance by reason of certain acts and omissions of said FDIC. Once again Appellant Victoria, in order to establish said claim, must bring an action against the FDIC. Clearly an action against the FDIC is one deemed to arise under the laws of the United States, 12 U.S.C. 1819.

Further, since the claims of other depositors in the bank will be affected by whether or not Appellant Victoria can establish its claim of a constructive trust and for priority over said other depositors, they are proper parties to this litigation.

Rule 19 of the Federal Rules of Civil Procedure;
State of Washington v. United States (9 Cir. 1936), 87 F. 2d 421;

Developments in the Law—Multi-Party Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 880-885 (1958).

Granting the relief requested by Appellant Victoria either as a constructive trust or by subordinating the rights of the other depositors to the claim of Appellant Victoria would have an injurious effect on said other depositors; therefore, they are proper parties.

The questions and issues presented in the complaint and the cross-claims involved in this case involve an interpretation of the provisions of Section 194 of Title 12 of the United States Code in connection with rata-

ble dividends. It also involves an interpretation of the effect of a violation of the provisions of Section 371b of Title 12 of the United States Code with regard to the interest rate that member banks of the Federal Reserve system may pay on time and savings deposits. Thus, issues are presented in the complaint and in the cross-claims involving federal statutes.

When a national bank is placed in receivership, federal law and federal questions are presented in connection with the distribution of its assets.

American Surety Co. v. Bethlehem Bank
(1941), 314 U.S. 314;

Chicago First National Bank v. Selden (7 Cir.
1903), 120 Fed. 212;

Auburn Sav. Bank v. Hayes (C.C. N.D.
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590, 84 L. Ed. 694, rehearing denied 60 S. Ct.
1071, 310 U.S. 676, 84 L. Ed. 1420.

In *Auburn Sav. Bank, supra*, plaintiff, a state savings bank, brought an action in a state court against the receiver of an insolvent national bank to have its deposit in said insolvent bank paid in full rather than pro rata. On the motion of the defendant receiver the federal court ordered the action remanded to federal court since it was a controversy arising under the laws of the United States. It is submitted that this case raises substantially the same jurisdictional question as principal case and the relief sought by the plaintiff in said case is identical to the relief sought by Appellants AT&T and Victoria.

In *First National Bank of Chicago v. Selden*, *supra*, the court held that when a national bank has been placed in the hands of a receiver federal law becomes the law on the distribution of its assets and for the determination of whether a claimant is entitled to preference over other creditors.

Even if it were time, which Appellant Victoria does not concede, that some of the questions presented as against defendant other than the FDIC do not involve Federal questions, this Court would have ancillary or pendant jurisdiction to decide the same. They all involve the questions of the insolvent national bank and the priority of claims in liquidation thereof. *Siler v. Louisville & Nashville R.R. Co.* (1909), 213 U.S. 175.

Taussig v. Wellington Fund, Inc. (3 Cir. 1963), 313 F. 2d 472.

Appellant AT&T and Appellant Victoria both followed the suggestions contained in the Orders of Judge Mathes in dismissing this case without prejudice by petitioning to intervene to present their claims in the liquidation proceedings. The petitions of each of said appellants in connection with their claims in said liquidation proceedings were dismissed on motion of defendant FDIC herein, by Order of Judge Wollenberg dated July 7, 1966, and filed on July 8, 1966, on the apparent ground that Title 12, Section 192 of the United States Code under which the Receiver brought said proceeding for the approval of a transaction compromising certain assets of the Bank, does not permit an adversary proceeding between the Receiver and creditors, and that the creditors' sole remedy is that of a plenary suit. Both Appellant AT&T and Appellant

Victoria have filed appeals from said Order, which are presently pending in this court, case No. 21258C.

If the facts alleged in the complaint of Appellant AT&T and in the counterclaims and cross-claims of Appellant Victoria are true, which must be taken as true on the motion to dismiss, then they are entitled to relief as against defendant and cross-defendant FDIC, both in its capacity as receiver and as insurer, and said relief vitally affects the other defendants and cross-defendants, and, therefore, they are proper parties thereto; and since the relief sought involves interpretations of federal statutes and the rights and obligations of a federal agency, to wit, the FDIC, both as receiver and as insurer, and is a part of the liquidation of a national bank, the relief should properly be given by a federal court. This should be done either in this plenary suit, as requested by these appellants, or in the liquidation proceeding. It is indeed inequitable for the FDIC to argue in both this case and in the liquidation proceeding case that the claims of these appellants should be dismissed and, in effect, that they, therefore, have no legal remedy in the federal courts.

For the foregoing reasons Appellant Victoria respectfully submits that the orders of Judge Mathes appealed from be reversed, and that said appellant be permitted to proceed to trial on the merits of its claim.

Respectfully submitted,

HAHN & HAHN,

DAVID K. ROBINSON,

By DAVID K. ROBINSON,

*Attorneys for Appellant Victoria
Savings and Loan Association.*

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID K. ROBINSON,

